

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB JDC 20-03 Contingency Fee Multipliers

SPONSOR(S): Judiciary Committee

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Judiciary Committee		Jones	Luczynski

SUMMARY ANALYSIS

In certain situations after the resolution of a court case, the court may require one party to pay the opposing party's attorney fees. Several Florida and federal statutes, known as "fee-shifting statutes," entitle the prevailing party to a "reasonable" attorney fee as a matter of right. When a fee-shifting statute applies, the court must determine what constitutes a "reasonable" attorney fee.

Florida courts calculate reasonable attorney fees under the "lodestar approach." This approach requires the court to determine the number of hours reasonably expended on the case and multiply that number by the reasonable hourly rate, which produces the "lodestar amount."

In certain cases, the court further increases the lodestar amount by applying a "contingency fee multiplier," a concept that arose from judicial interpretations of fee-shifting statutes. In Florida courts, the size of the contingency fee multiplier may be based on the likelihood of success at the outset of the case, as follows:

- If the likelihood of success at the outset of the case was more likely than not, the court may apply a multiplier of 1 to 1.5.
- If the likelihood of success was about even at the outset, the court may apply a multiplier of 1.5 to 2.0.
- If success was unlikely at the outset, the court may apply a multiplier of 2.0 to 2.5.

Federal case law provides that a contingency fee multiplier may only be used in rare and exceptional circumstances, and that the multiplier is completely unavailable under certain federal statutes. However, the Florida Supreme Court has taken a different approach, holding in 2017 that the contingency fee multiplier in Florida courts is not subject to the "rare and exceptional circumstances" requirement. Accordingly, there is now a difference between Florida and federal law with respect to this issue.

PCB JDC 20-03 prohibits a court from using a contingency fee multiplier when calculating an attorney fee award unless an applicable statute expressly allows use of the contingency fee multiplier.

The PCB appears to have no fiscal impact on state or local governments.

The PCB has an effective date of July 1, 2020, and applies to all actions filed on or after that date.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

In certain situations, a court may require one party to pay the opposing party's attorney fees. The traditional "English rule" entitled a prevailing party to attorney fees as a matter of right. Florida, however, with a majority of other U.S. jurisdictions, adopted the "American rule," under which each party is responsible for its own attorney fees unless a statute provides an entitlement to fees.

Contingency Fees

A contingency fee is an attorney fee that is charged only if the lawsuit is successful or favorably settled out of court.¹ In turn, an attorney and a client may enter into a contingency fee contract, agreeing that the client will pay the attorney a fee only if the attorney successfully recovers for the client.

The Florida Supreme Court, through its Rules Regulating the Florida Bar, allows contingency fee contracts but restricts their use.² Rule 4-1.5(f) prohibits contingency fees in criminal defense and certain family law proceedings.³ The rule also requires a contingency fee agreement to:

- Be in writing.
- State the method by which the fee is to be determined.
- State whether expenses are to be deducted before or after the contingency fee is calculated.
- In certain types of cases, include other provisions ensuring the client is aware of the agreement's terms.⁴

Upon conclusion of a contingency fee case, the attorney must provide the client a written statement stating the outcome of the case, the amount remitted to the client, and how the attorney calculated the amount.⁵

Computation of Attorney Fees

Several Florida and federal statutes state that in actions under those statutes, the prevailing party is entitled to attorney fees as a matter of right.⁶ These statutes are known as "fee-shifting statutes" and often entitle the prevailing party to a "reasonable" attorney fee.⁷ When a fee-shifting statute applies, the court must determine and calculate what constitutes a "reasonable" attorney fee.

Lodestar Approach

¹ See Black's Law Dictionary 338 (8th ed. 2004).

² R. Regulating Fla. Bar 4-1.5(f).

³ R. Regulating Fla. Bar 4-1.5(f)(3).

⁴ R. Regulating Fla. Bar 4-1.5(f)(1) and (4).

⁵ R. Regulation Fla. Bar 4-1.5(f)(1).

⁶ See, e.g., s. 627.428, F.S. (providing that an insured who prevails against an insurer is entitled to "a reasonable sum" of attorney fees); s. 501.2105, F.S. (providing that the prevailing party in an action under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) is entitled to "a reasonable legal fee"); 42 U.S.C. s. 1988(b) (providing that a prevailing party seeking to enforce specified civil rights statutes may recover "a reasonable attorney's fee").

⁷ See s. 627.428, F.S.

In 1985, the Florida Supreme Court held that courts should calculate the amount of statutorily-authorized attorney fees under the "lodestar approach."⁸ Under this approach, the first step is for the court to determine the number of hours reasonably expended on the case. The second step requires the court to determine a reasonable hourly rate. The number of hours reasonably expended (determined in the first step), multiplied by the reasonable hourly rate (determined in the second step), produces the "lodestar amount," which is considered an objective basis for what the attorney fee amount should be.

Contingency Fee Multiplier

In certain cases, the court increases the lodestar amount by applying a "contingency fee multiplier" (also known as a "contingency risk" factor).⁹ The concept of the contingency fee multiplier arose from judicial interpretations of statutory authorization of attorney fees in particular cases,¹⁰ but the Legislature may also expressly provide for use of a contingency fee multiplier in certain cases.¹¹ In a 1990 case, the Florida Supreme Court discussed three different types of cases and whether a contingency fee multiplier should be applied in each case, as follows:

- *Public policy enforcement cases.* These cases may involve discrimination, environmental issues, and consumer protection issues. In these cases, a contingency fee multiplier is usually inappropriate.
- *Family law, eminent domain, estate, and trust cases.* In these cases, a contingency fee multiplier is usually inappropriate.
- *Tort and contract claims, including insurance cases.* In these cases, a contingency fee multiplier may be applied if the plaintiff can demonstrate the following factors show a need for the multiplier:
 - Whether the relevant market requires a contingency fee multiplier to obtain counsel;
 - Whether the attorney can mitigate the risk of nonpayment; and
 - Whether any other factors established in *Rowe* support the use of the multiplier.¹²

Further, in the same decision, the Court noted that the size of the contingency fee multiplier should be based on the likelihood of success at the outset of the case, as follows:

- If the likelihood of success was more likely than not at the outset of the case, the court may apply a multiplier of 1 to 1.5;
- If the likelihood of success was about even at the outset, the court may apply a multiplier of 1.5 to 2.0; and
- If success was unlikely at the outset, the court may apply a multiplier of 2.0 to 2.5.¹³

Therefore, under current law, an attorney is more likely to receive a higher contingency fee multiplier—and thus a higher attorney fee award—if he or she takes a case that at the outset seems unlikely to succeed.

Federal Court Treatment of the Contingency Fee Multiplier

Part of the Florida Supreme Court's rationale for adopting the contingency fee multiplier framework in 1985 was that, at the time, it was being applied in federal courts.¹⁴ However, in 1992, the U.S. Supreme Court decided *Burlington v. Dague*, in which it rejected the use of a contingency fee multiplier under

⁸ *Fla. Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985).

⁹ The Court may also adjust the amount based on the results obtained by the attorney. *Standard Guar. Ins. Co. v. Quanstrom*, 555 So. 2d 828, 830-31 (Fla. 1990).

¹⁰ The rationale for using a contingency fee multiplier to increase an attorney fee award is that plaintiffs and plaintiffs' attorneys generally do not recover any money unless they prevail. The attorney fee multiplier induces attorneys to take a risk on cases they might not otherwise take, allowing would-be plaintiffs to find attorneys willing to represent them on a contingency fee basis.

¹¹ See s. 790.33, F.S. (explicitly authorizing a contingency fee multiplier in certain cases relating to the preemption of firearm and ammunition regulation).

¹² *Quanstrom*, 555 So. 2d at 833-35.

¹³ *Id.* at 834.

¹⁴ See *Rowe*, 472 So. 2d at 1146 ("[W]e . . . adopt the federal lodestar approach for computing reasonable attorney fees").

certain federal fee-shifting statutes. *Dague* essentially signaled that the Supreme Court was closing the door on the contingency fee multiplier's use in most, if not all, federal cases.¹⁵

The U.S. Supreme Court again addressed the contingency fee multiplier issue eighteen years later, in a case involving a class action lawsuit filed on behalf of 3,000 children in the Georgia foster care system.¹⁶ The plaintiffs argued in the underlying case that the foster care system in two counties was constitutionally deficient. The case went to mediation, and the parties entered a consent decree resolving all issues. Subsequently, the plaintiffs' attorneys sought attorney fees under 42 U.S.C. s. 1988.¹⁷

The federal district court calculated the fees using the lodestar approach, arriving at a \$6 million figure, and then applied a 75 percent contingency fee multiplier, for a total attorney fee of \$10.5 million. The district court justified the contingency fee multiplier by finding that the attorneys had:

- Advanced \$1.7 million with no ongoing reimbursement.
- Worked on a contingency basis, and therefore were guaranteed no payment.
- Displayed a high degree of skill, commitment, dedication, and professionalism.
- Achieved extraordinary results.¹⁸

On review, the U.S. Supreme Court reversed the district court's calculation of attorney fees, remanding the case because the district court did not provide adequate justification for the 75 percent increase. The Court reiterated that "there is a strong presumption that the lodestar figure is reasonable," but that such presumption "may be overcome in those *rare circumstances* in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee."¹⁹

Thus, the *Perdue* Court rejected the notion that an attorney fee multiplier is always inappropriate, while also issuing several warnings about contingency fee multipliers, as follows:

- When a trial court fails to give detailed explanations for why it applies a contingency fee multiplier, "widely disparate awards may be made, and awards may be influenced . . . by a judge's subjective opinion regarding particular attorneys or the importance of the case."²⁰
- "[U]njustified enhancements that serve only to enrich attorneys are not consistent" with the aims of a statute that seek to compensate plaintiffs.²¹
- In many cases, attorney fees "are not paid by the individuals responsible for the constitutional or statutory violations on which the judgment is based Instead, the fees are paid . . . by state and local taxpayers," resulting in a diversion of funds from other government programs.²²

Recent Florida Supreme Court Treatment of the Contingency Fee Multiplier

In 2017, the Florida Supreme Court rejected the U.S. Supreme Court's *Dague* decision, instead holding that the contingency fee multiplier in Florida courts is not subject to the "rare and exceptional circumstances" requirement. The Court acknowledged that there is now in Florida a "separation from federal precedent in this area."²³

¹⁵ See *City of Burlington v. Dague*, 112 S. Ct. 2638 (1992) ("Thus, enhancement for the contingency risk posed by each case would encourage meritorious claims to be brought, but only at the social cost of indiscriminately encouraging nonmeritorious claims to be brought as well . . . [W]e hold that enhancement for contingency is not permitted under the fee-shifting statutes at issue").

¹⁶ *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662 (2010).

¹⁷ 42 U.S.C. s. 1988(b) allows the court to award attorney fees to the prevailing party in certain civil rights actions.

¹⁸ *Perdue*, 130 S. Ct. at 1670.

¹⁹ *Id.* at 1673 (emphasis added).

²⁰ See *id.* at 1676.

²¹ See *id.*

²² See *id.* at 1677.

²³ *Joyce v. Federated Nat'l Ins. Co.*, 228 So. 3d 1122, 1132 (Fla. 2017) ("[W]ith all due deference to the United States Supreme Court, we do not accept the *Dague* majority's rationale for rejecting contingency fee multipliers").

Effect of Proposed Changes

PCB JDC 20-03 prohibits a court from applying a contingency fee multiplier when calculating an attorney fee award unless an applicable statute expressly allows use of the multiplier. This means that Florida courts will continue to calculate what is a reasonable attorney fee by using the lodestar approach, but will not enhance the lodestar amount with a contingency fee multiplier.

The PCB has an effective date of July 1, 2020, and applies to cases filed on or after that date.

B. SECTION DIRECTORY:

Section 1: Amends s. 57.104, F.S., relating to computation of attorneys' fees.

Section 2: Provides an effective date of July 1, 2020.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The PCB's elimination of the contingency fee multiplier in most cases may reduce the amount of fees some attorneys recover.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES